Louisiana-Pacific Corporation, Western Division *and* Association of Western Pulp and Paperworkers, Local 49. Cases 20–CA–24231, 20–CA–24343, and 20–CA–24413

September 20, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions to the decision in this case[1] present, inter alia, the following issues: (1) whether the Respondent violated Section 8(a)(5) by arranging with a competitor for an in-kind trade of pulp during a plant shutdown; and (2) whether the Respondent violated Section 8(a)(5) by refusing to ''red-circle'' the wage rates of two chip dump CAT operators.[2]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions, as modified, and to adopt the recommended Order, as modified below.

The Pulp Mill Shutdown

The Respondent operates a pulp mill and a sawmill in Samoa, California.[4] From mid-October through December 1991, the Respondent, for economic reasons, shut down its pulp mill operation.[5] During late October or early November 1991, one of the Respondent's major customers, C. Itoh Company (Itoh), approached the Respondent for a supply of 5000 tons of pulp. The Respondent explained that its pulp mill was shut down, that it would cost approximately $200,000 to reopen it, and that it would do so only if Itoh would pay the cost to reopen the plant in addition to the cost of the pulp. Itoh refused and threatened that, if forced to find another supplier, the Respondent would risk losing Itoh's business permanently. After further negotiations, Itoh suggested that the Respondent borrow the 5000 tons of pulp from a competitor to satisfy Itoh's order.[6]

Acting on Itoh's suggestion, the Respondent arranged with a nearby competitor, Simpson Paper Company (Simpson), to fill Itoh's order and to the Respondent to fill a similar order for one of Simpson's customers when the Respondent became operational. Simpson filled Itoh's order in November 1991; the Respondent filled an order for a similar quantity of pulp for Simpson's customers in January and February 1992.

The complaint alleges, and the judge found, that the Respondent violated Section 8(a)(5) by ''subcontracting out an order for pulp product rather than recall Unit employees at the Pulp Mill to do this work.'' The judge found that the arrangement with Itoh, which the Respondent admits it made without notice to or bargaining with the Union, deprived the unit employees, during late 1991, of work they ordinarily performed. Rejecting the Respondent's argument that the employees did not incur a loss as a result of the arrangement, the judge found that the Respondent's employees were deprived of the time value of the money they would have earned had they been permitted to perform the work in November. Moreover, the judge found that the Respondent presented no evidence that it would have suffered any economic detriment by the passage of time required to notify and bargain with the Union.

The Respondent argues on exception that it was not obligated to bargain with the Union because the in-kind trade of pulp did not materially and substantially change the employees' terms and conditions of employment. The Respondent points out that it had informed Itoh that it (the Respondent) had no intention of reopening the pulp mill to fill Itoh's order unless Itoh agreed to bear the $200,000 cost. Moreover, the Respondent notes that, because the employees performed work for Simpson in early 1992—work which they otherwise would not have had—the employees suffered no overall detriment, and indeed benefited,

[1] On December 23, 1992, Administrative Law Judge William J. Pannier III issued the attached decision and errata. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

[2] We find no merit to the Respondent's exceptions to the judge's findings that the Respondent violated Sec. 8(a)(5) by eliminating Local rule 9 from its implemented terms and conditions of employment after impasse and by transferring unit work to nonunion sawmill employees. In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally eliminating Local rule 9, we do not rely on the judge's discussion of the parties' agreement to ''call each other back'' to the bargaining table. Nevertheless, we agree with the judge's finding that the Respondent was not privileged to make last-minute changes to its final proposal prior to implementation without first offering the Union a meaningful opportunity to bargain.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent does not except to the judge's findings that it violated Sec. 8(a)(1) by threatening to curtail overtime assignments if grievances about overtime assignments were filed, and Sec. 8(a)(3) by withdrawing an offer to partially reimburse an employee for medical expenses because he filed a grievance and pursued it to arbitration. The Respondent also does not except to the judge's finding that it violated Sec. 8(a)(5) by unilaterally allowing nonunit employees to perform shipping and receiving work during the plant shutdown.

[4] The Union represents a unit of production and maintenance employees at the pulp mill. The sawmill employees are not represented by any labor organization.

[5] The General Counsel does not challenge the propriety of the shutdown.

[6] In the past the Respondent had arranged for similar in-kind trades of materials with a competitor.

from the Respondent's decision. We find merit in the Respondent's exception.

As the Respondent correctly notes, an employer is not obligated to bargain over a decision to subcontract unit work if the decision would have no substantial, significant, or material effect on the employees' terms and conditions of employment. See *Westinghouse Electric Corp*., 153 NLRB 443, 446–447 (1965) (no violation where employees suffered no ''significant detriment'' as a result of subcontracting unit work); see also *Precision Castings Corp*., 233 NLRB 183 fn. 1 and 210–211 (1977) (no violation where subcontracting occurred after plant had been closed and employees terminated). We find that, under the circumstances of this case, the in-kind trade of pulp did not have a significant detrimental effect on the unit employees.

We note first that the pulp mill was closed at the time Itoh approached the Respondent with its order for 5000 tons of pulp. Thus we are *not* here faced with a situation in which the Respondent could merely have postponed the mill closing or not closed it at all. Rather, as the judge noted, the Respondent had closed the plant in October, well before Itoh placed its order for pulp, and there is no dispute that it would have cost approximately $200,000 to reopen the plant to fill the order. There also is no evidence to contradict the Respondent's contention that it had no intention of reopening the plant to fill Itoh's order, even at the risk of losing Itoh's business.

Because the pulp mill had been shut down and the employees laid off, a decision to which the General Counsel does not take issue, and because the evidence supports the Respondent's contention that it would not have opened the plant unless Itoh agreed to bear the cost, we find that the employees would have had no occasion to perform the work in any event during the latter part of 1992. We find, therefore, contrary to the judge, that the employees did not sustain a significant detriment as a result of the Respondent's arrangement with Simpson.[7] Accordingly, we find that the Respondent did not violate Section 8(a)(5) and (1) by arranging an in-kind trade of pulp with a competitor.[8]

The Chip Dump Cat Operators

We agree with the judge that the Respondent violated Section 8(a)(5) by revoking its agreement to apply the red-circle provision in the collective-bargaining agreement to employees adversely affected by the shutdown of the Respondent's power boiler operation.[9] We do not agree, however, with the judge's finding that the agreement extended beyond the 37 employees in the power boiler operation to encompass the 2 chip dump CAT operators. The judge noted that on August 16, 1991, the Respondent sent a memo to its employees to ''explain the various procedures and plans associated with the reduction of Pulp Mill employees.'' Paragraph 6 of that memo stated:

> Those employees who displace junior employees and remain in the mill will have their rates red circled. In future years, employees' rates that are red circled will only receive 50% of future increases. They may also lose their rates if they refuse to exercise their seniority and bid on available jobs.

Although the Respondent's August 16 memorandum to employees could be read to apply more broadly, we find that the context in which the memorandum was issued—2 days after the steering committee meeting of Union and Respondent representatives to discuss the imminent, permanent shutdown of the power boiler operation—reasonably confines the agreement to employees of that operation.[10]

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[7] The General Counsel's reliance on *Torrington Industries*, 307 NLRB 809 (1992), is misplaced. In that case, the employer laid off unit employees and transferred a truck and a nonunit driver to perform the unit work. We found that the decision to lay off unit employees and replace them with nonunit employees and independent contractors to perform the same work constituted essentially ''*Fibreboard*-type subcontracting'' and did not change the scope or direction of the business. In that case, the General Counsel took issue with the decision to lay off the unit employees. In this case, by contrast, the complaint alleges at most a failure to recall the unit employees, by reopening the mill, but does not challenge the Respondent's decision to close the mill in the first place. Given this factual distinction, *Torrington Industries* has no application to this case.

Member Raudabaugh does not agree that a decision concerning whether or when to end a layoff has no significant impact on unit employees. In his view, such a decision, like the decision to have the layoff in the first place, does have such an impact on unit employees. He would apply the test in *Dubuque Packing*, 303 NLRB 386 (1991), to such a decision. See generally his concurring opinion in *Holmes & Narver*, 309 NLRB 146 (1992). Applying that test, he assumes arguendo that the General Counsel met his prima facie burden under *Dubuque*. However, the Respondent has shown that the decision was not based on labor costs; it was based on the Respondent's unwillingness to spend $200,000 to reopen the facility. Accordingly, the decision was not a mandatory subject.

[8] Therefore, we adopt the judge's conclusions of law except as modified above.

We also adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by transferring unit mechanical work to nonunit sawmill employees during the pulp mill shutdown. By contrast to the in-kind trade, the Respondent demonstrated a willingness to, and did, call in laid-off mechanics during the shutdown to perform mechanical work, and pulp mill mechanics thereby suffered significant detriment when their work was transferred to the sawmill.

[9] The contractual provision reads as follows:

> In the event [Respondent] permanently eliminates an established regular job classification, those employees with five (5) or more years of service in the mill who occupied that job classification at the time it was eliminated shall not have their straight-time hourly rate reduced below that of the eliminated classification at the time of discontinuance unless they refuse to accept a promotion or refuse to bid for available job openings. . . .

[10] We do not agree that Industrial Relations Manager Greenhalgh's acknowledgment at trial that the Respondent had probably ''provided a benefit that . . . some of the employees weren't entitled to under

Accordingly, we reverse the judge's finding only to the extent that his remedy[11] and Order could be read to include the two chip dump CAT operators.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Louisiana-Pacific Corporation, Western Division, Samoa, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(c).

''(c) Make whole, with interest on the amounts owing, all employees for any losses of pay and benefits suffered as a result of elimination of the layoff restriction set forth in Local rule 9, of refusal to honor the red-circle wage rate agreement of August 1991, and of performance of mechanic and storeroom clerk work by nonunit employees during the last 4 months of 1991.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT change any term or condition of employment of employees in the appropriate unit described below, without first giving notice to Association of Western Pulp and Paperworkers, Local 49 and affording it an adequate opportunity to bargain about that proposed change. The appropriate bargaining unit is:

> All hourly paid employees in the Machine Room, Pulping, Causticizing, Material Handling & Shipping, Chip Dump, Storeroom, Technical, Recovery, Power Boiler, and General Departments and all Maintenance Department hourly paid employees of the pulp mill in Samoa, California; excluding employees classified as, or working in, administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupation requiring professional training, accounting, clerical, stenographic and other office work.

WE WILL NOT rescind and refuse to honor agreements reached with the above-named labor organization concerning employment terms and conditions of employees in the above-named bargaining unit.

WE WILL NOT withdraw offers to reimburse employee expenses for medical examination and treatment, or otherwise discriminate against employees because grievances are processed to arbitration, nor because of activity or support for the above-named labor organization or any other labor organization.

WE WILL NOT threaten employees with discontinuance of overtime assignments if grievances are filed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore and observe the layoff restriction set forth in Local rule 9 of our 1988–1991 collective-bargaining contract with the above-named labor organization and, in addition, the terms of the our red-circle wage agreement of August 1991.

WE WILL reinstate any employee laid off as a result of failure to continue observing the layoff restriction set forth in Local rule 9 and reinstate the red-circle wage rates earned by employees pursuant to the agreement of August 1991.

WE WILL make whole, with interest, all employees for any losses of pay and benefits suffered as a result of our elimination of the layoff restriction set forth in Local rule 9, of our refusal to honor the red-circle wage rate agreement of August 1991, and of the performance of mechanic and storeroom clerk work by nonunit employees during the last 4 months of 1991.

LOUISIANA-PACIFIC CORPORATION,
WESTERN DIVISION

Frank M. Wagner, for the General Counsel.

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the [expired collective-bargaining] agreement'' constituted an admission that the Respondent understood the agreement to have broader application. In our view, Greenhalgh's statement admits to nothing more, in light of the chip dump employees' claims, than a recognition of *unintended* consequences resulting from the parties' agreement to red-circle the power boiler operation employees.

[11] Backpay for employees who were laid off as a result of the Respondent's unlawful unilateral changes shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Backpay for employees whose pay was reduced as a result of such changes shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

Robert Hulteng and *Edward J. Goddard (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, and *Chris Beincourt*, of Aden Lake, Idaho, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Eureka, California, on August 12 and 13, 1992. On February 24, 1992, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidating for hearing and decision separately issued complaints, one based on a charge filed in Case 20–CA–24231 on September 19, 1991, another based on a charge filed in Case 20–CA–24343 on November 19, 1991, and a third based on a charge filed in Case 20–CA–24413 on January 10, 1992, collectively alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. § 151, et seq. (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[1] on the briefs that were filed, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Louisiana-Pacific Corporation, Western Division (Respondent) has been a California corporation, with a pulp mill located in Samoa, California, engaged in the business of processing and selling paper and other wood products on a nonretail basis. In the course and conduct of those business operations during calendar year 1990 and, again, during calendar year 1991, Respondent sold goods valued in excess of $50,000 directly to customers located outside the State of California and to enterprises within California, each of which meets the applicable Board standard for asserting jurisdiction on a direct basis. Therefore, I conclude, as admitted in each of Respondent's answers to complaint, that at all times material Respondent has been an employer in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Association of Western Pulp and Paperworkers, Local 49 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

This case presents a potpourri of issues, based on mostly undisputed evidence, arising from a bargaining relationship between the Union and Respondent. Their most recent collective-bargaining contract had a stated term of June 1, 1988, to May 31, 1991. Essentially, it encompassed an admittedly appropriate bargaining unit of employees working at Respondent's pulp mill in Samoa. Thus, as recited in section 3 of that contract, the bargaining unit is:

> All hourly paid employees in the Machine Room, Pulping, Causticizing, Material Handling & Shipping, Chip Dump, Storeroom, Technical, Recovery, Power Boiler, and General Departments and all Maintenance Department hourly paid employees; excluding employees classified as, or working in, administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other office work.

One of the employees in that unit had been Chuck Annis, a shift millwright who had worked for Respondent for a number of years, but who had passed away by the time of the hearing in this proceeding. As a shift millwright, Annis had been required to wear a self-contained breathing apparatus or respirator when responding to fires or whenever a toxic chemical leak occurred. A medical examination in early 1990 disclosed that he had developed a pulmonary impairment that left him unable to wear that apparatus. During that examination, Annis had mentioned that he had been exposed to asbestos while working in earlier years at the pulp mill. As a result, the attending physician, Phillip L. Wagner, M.D., suggested in a letter to Industrial Relations Manager Richard Greenhalgh that Annis ''be offered examination at the University of California occupational pulmonology department in San Francisco to rule out a preventable progressive disorder.''

Wagner's suggestion was followed. Annis made three trips to San Francisco during July and August 1990. Greenhalgh testified that, before the first of them, he had notified Annis that Respondent's workmen's compensation program would reimburse his trips' expenses if there was an ultimate determination that his condition was associated with asbestosis, but would not provide reimbursement if it was determined that his condition was not work-produced. As set forth in a letter to Dr. Wagner, dated August 13, 1990, Professor of Clinical Medicine Jeff Goldman, M.D. concluded that Annis did ''not have interstitial lung disease from an occupational exposure.''

Nevertheless, Annis filed a claim for reimbursement of all expenses for the three San Francisco trips. Believing that it had derived some benefit from the testing conducted there, Respondent offered to compensate Annis for some of those expenses. In a letter dated October 29, 1990, Greenhalgh notified Annis, inter alia:

> I have reviewed your expense request for costs incurred and wages lost while being tested at the University of California Occupational Pulmonary Department in San Francisco.
>
> . . . .
>
> As I explained, the Company cannot be responsible for the costs of medical tests merely because the employee assumes the underlying condition to be work-related. Notwithstanding this, the Company did derive some incidental benefit from your tests and we are therefore willing, as a goodwill gesture, to pay the difference between the cost of the tests and what your group health

[1] The General Counsel's unopposed motion to correct transcript in three respects is granted.

> plan paid. I understand this to be approximately $599.00. This is done on the basis it will not establish any precedent and that there will be no further claims against the Company in this matter.

Gerald Cawvey, an instrument mechanic who was chairman of the Union's delegation to the Standing Committee, a body described below, testified that after receiving the letter Annis had ''wanted to grieve for all of the expenses.'' However, there is no evidence that he ever actually did so. In fact, there is no evidence that he or the Union voiced any response whatsoever to Greenhalgh's letter by November 9 when, due to his pulmonary condition, Respondent transferred Annis from shift millwright to day-shift worker.

Although that transfer resulted in a pay reduction for Annis, the General Counsel does not challenge its legality. Nor does the General Counsel contest any of Respondent's other actions described in the immediately preceding paragraphs regarding Annis. Instead, the 8(a)(3) and (1) allegation pertaining to Annis arises from the following subsequent events. On the date that he received notice of his transfer, Annis filed, and the Union began processing a grievance protesting that the transfer had constituted a contractual violation: ''SEC. 21 SENIORITY. FORCING CHUCK OFF OF SHIFT MILLWRIGHT JOB IS A SENIORITY VIOLATION.'' The Union and Annis processed that grievance through arbitration, where a decision was rendered sustaining the propriety of Respondent's transfer decision. Although the grievance did not involve Annis' expenses for medical testing in San Francisco, it did become a factor in Respondent's ultimate decision to withdraw the above-quoted reimbursement offer in Greenhalgh's letter of October 29, 1990, the action which the General Counsel does allege violated Section 8(a)(3) and (1) of the Act.

Greenhalgh initially testified that Respondent's withdrawal of its partial reimbursement offer had occurred because Annis ''never contacted me nor did a union representative that they wanted to accept this offer,'' but Greenhalgh continued by adding ''because [Annis] didn't agree with the conditions that I put in the letter of October 29th 1990.'' Asked to explain what he meant by ''not agree to the conditions,'' Greenhalgh testified:

> He did not—he did not respond. He did not call. No one made any indication that the $599 was acceptable to him.
>
> I should say beyond that, when we got a grievance we assumed that he was going to be pursuing his—the issue at least beyond what we had offered, and so we assumed that this offer we had made had been rejected, and I think we so indicated in a standing committee meeting that based upon his pursuing this grievance and other issues, that we would withdraw our offer.

In fact, in a letter to Cawvey, dated March 22, 1991, pertaining to ''open items from our last Standing Committee Meeting on March 14, 1991,'' Greenhalgh stated specifically:

> 3. Grievance No. 59–90, Chuck Annis removal from shift. With a Class II profile, Mr. Annis was medically precluded from wearing a respirator except to escape. This was incompatible with responsibilities of a shift Millwright. The letter enclosed was an offer to underwrite part of the costs for the medical evaluation. If you choose to pursue this grievance to arbitration, this would void our offer.

The General Counsel points to the admitted reliance on pursuit of Annis' grievance to arbitration as the basis for arguing that Respondent violated Section 8(a)(3) and (1) of the Act when it withdrew its partial reimbursement offer. In opposition, Respondent contends that there is no evidence that it harbored animus or otherwise had been acting to retaliate against Annis. It further contends that Greenhalgh's letter ''was analogous to a proposal to settle a pending employment dispute'' that Respondent ''was under no obligation to keep . . . on the table for any length of time'' and, that Annis and the Union's nonresponse, coupled with pursuit to arbitration of the grievance concerning Annis' job transfer resulting from his pulmonary disorder, constituted objective evidence that Respondent's ''conditional settlement offer'' was not acceptable to Annis. For the reasons set forth in subsection III,F, infra, I reject those contentions and conclude that Respondent did violate Section 8(a)(3) and (1) of the Act by withdrawing its offer to partially reimburse some of Annis' expenses of traveling to San Francisco for medical examination.

An alleged independent violation of Section 8(a)(1) of the Act arises from an incident occurring during the night shift on August 5 and 6, 1991, when Machine Room Production Superintendent Edwin Eaton needed a day-shift employee to report early to feed operating bales to the beater. Rather than call Arthur Nally and Joe Mills, the two senior day-shift employees who rarely had been willing to accept such overtime work, Eaton called Charles Baker, a day-shift employee who usually responded to such calls and who, indeed, did report between 1 and 3 a.m. in response to Eaton's call that morning. Nally then reported for work at his usual 7 a.m. starting time and, discovering what had occurred, complained to Eaton during an in-plant telephone conversation. Nally testified that when he had said that Eaton's explanation—that Eaton needed someone and that Nally did not normally work overtime—made no difference, Eaton had retorted that if Nally filed a grievance, ''I'm going to go down there and send those guys home and there won't be anymore overtime. We'll have it done on day shift.''

Similarly, Shannon Newman, who had recently become shop steward, testified that when he had come to Eaton's office later that day with Nally's grievance, Eaton had ''said if I filed the grievance, that he'd cut off the overtime, and have the guys on day shift in the yard labor crew do the jobs—that job.'' According to Newman, he left the office with the grievance after Eaton had instructed him to, ''Take your grievance back. Talk to the guys on [Newman's] crew and see what they want to do, and get back to me.''

Based on the foregoing testimony, the General Counsel alleges that Respondent, through Eaton, violated Section 8(a)(1) of the Act by threatening to curtail overtime work assignments if employees filed grievances. As discussed in more detail in subsection III,G, infra, while Eaton denied that he had made the above-quoted statements to Nally and to Newman, his own accounts of those conversations, as well as certain objective considerations that he acknowledged, tend to support the two employees' seemingly candid de-

scriptions of Eaton's statements. By virtue of his having made them, Respondent violated Section 8(a)(1) of the Act.

Five separate allegations are made under Section 8(a)(5) and (1) of the Act, arising from events occurring after the 1988–1991 contract had been reopened and 22 bargaining sessions had led to impasse in mid-July 1991. By letter dated July 31, 1991, Respondent's legal counsel, Chris Beincourt, notified the Union's principal negotiator, Robert W. Crane, that Respondent intended to implement, in effect, its final offer, the terms of which were ''detailed on the attachment [to Beincourt's letter] effective August 10, 1991. Our final offer will be available for acceptance until that time.'' The General Counsel does not challenge the propriety of the bargaining that occurred, the impasse that was reached, nor the stated terms in the attachment to Beincourt's letter that were, in fact, implemented on August 10, 1991. Rather, the complaint's alleged violations of Section 8(a)(5) and (1) of the Act are based on events occurring after Beincourt's letter had been sent to Crane.

The first one alleges that Respondent belatedly supplied an additional change to that attachment's list, and implemented that change on August 10, 1991, without affording the Union notice and adequate opportunity to bargain about it. That allegation pertains to Local Rule 9 appearing in Exhibit D, on page 78, of the 1988–1991 contract. It covers maintenance work and states:

> 9. Contracting of Work
>
> The Company will not lay off mill mechanics while contracting out in-plant maintenance work that could be performed by mill mechanics.

Respondent concedes that at no point during the negotiations did it specifically propose eliminating Local Rule 9. No mention of that rule appears in the attachment to Beincourt's letter of July 31, 1991.

By letter to Crane and Norman Miller, the Union's president, dated August 8, 1991, Beincourt announced, in pertinent part,

> I am writing to notify you of [Respondent's] intent to exempt Local Rule 9 from those provisions of the expired agreement which will be effective beginning August 10, 1991. That provision, as you know, would bar the Company from contracting out in-plant maintenance work that could be performed by laid-off mill mechanics.
>
> . . . .
>
> We believe that the bargaining history is clear and that the implemented terms would allow [Respondent] to determine whether it makes sense to reduce manning and use contractors. To eliminate any chance for confusion, however, we did want to add Local Rule 9 to the list of items that would be implemented.
>
> If you have any questions, or if you do not agree that this is consistent with [Respondent's] position at the table, we hereby call you back to the table for further discussions. We are available to meet before implementation on August 10th if you like, or any day the following week if you deem necessary.

The General Counsel contends that so belated an announcement of Local Rule 9's elimination from what had become, by the time of Beincourt's letter, a term and condition of employment constituted a unilateral change that violated Section 8(a)(5) and (1) of the Act.

Respondent contends that during negotiations it had put the Union on notice that it intended to eliminate all manning restrictions by which it had been bound by the contract. As a result, urges Respondent, the Union should have been on notice that restrictions imposed by contractual provisions such as Local Rule 9 would be encompassed by that elimination posture. Furthermore, Respondent argues that the parties had agreed that tentative agreements could be modified until such time as the employees ratified a contract and since that never occurred, because the employees had rejected Respondent's final offer, both parties had remained free to modify their proposals, as Respondent did concerning Local Rule 9. Finally, contends Respondent, it is undisputed that no union representative contacted Respondent to object to, or negotiate about, eliminating Local Rule 9, though offered the opportunity to do so in the above-quoted final paragraph of Beincourt's letter to Crane and Miller. In consequence, Respondent urges, the Union waived whatever remained of its right to bargain about Local Rule 9's elimination. I reject these arguments.

As more fully discussed in subsection III,B, infra, Respondent's negotiating posture never necessarily encompassed Local Rule 9's restrictions and, indeed, Respondent specifically told the Union during negotiations that the rule's restriction was inapplicable to its proposal to remove contractual manning restrictions. Second, whatever the merit of an argument to allow preratification changes in proposals and tentative agreements, in announcing Local Rule 9's elimination Respondent failed to observe the very procedure agreed on for doing so. Consequently, it can take no solace in whatever such arrangement it now advances. Finally, as Beincourt's above-quoted letter states, despite the offer to bargain about elimination of Local Rule 9's restrictions, Respondent adhered to its position that implementation of its final offer would occur on August 10, 1991, 2 days after the date of Beincourt's letter announcing that elimination. Accordingly, the Union had been accorded only 1 day to formulate a bargaining position and negotiate about Respondent's suddenly announced reversal of position concerning Local Rule 9. So short a period hardly affords adequate opportunity for meaningful negotiations and, in fact, appears to have been nothing more than an exercise in going through the bargaining motions before implementing an already decided-on change in a term and condition of employment. Thus, in the circumstances, there is no basis for concluding that the Union's failure to respond constituted a waiver.

The second alleged violation of Section 8(a)(5) and (1) of the Act is that on September 26, 1991, Respondent unilaterally changed procedures concerning the effects on unit employees of a reduction in force. That allegation finds its origin in Exhibit A, section I, subparagraph C,10, on pages 47 to 48 of the 1988–1991 contract. That provision remained unaffected by the 1991 negotiations, impasse, and implementation of Respondent's final offer. It states:

> In the event [Respondent] permanently eliminates an established regular job classification, those employees

> with five (5) or more years of service in the mill who occupied that job classification at the time it was eliminated shall not have their straight-time hourly rate reduced below that of the eliminated classification at the time of discontinuance unless they refuse to accept a promotion or refuse to bid for available job openings, in which event their rate of pay, at that time, shall revert to the rate of their new job. Fifty percent (50%) of general wage increases and adjustments will not be used to increase their retained rate of pay.

In essence the provision ''red-circles'' existing wage rates of employees adversely affected by a reduction in force, so long as the provision's qualifications are satisfied, by allowing those employees to avoid having their wage rates dropped to the bottom rates of other progression ladders for jobs to which they are transferred.

By letter dated August 13, 1991, Pulp Mill Manager Fred R. Martin notified Union President Miller that the power boilers and associated equipment would be permanently shut down and that ''we have identified certain jobs which will no longer be required,'' followed by a list of 37 ''employees whose jobs will be eliminated.'' In fact, most, but not all, of those employees' job classifications had been eliminated. Nevertheless, all 37 employees would have their rates red-circled under the plan submitted to the Union by Martin.

On August 14, 1991, that subject was discussed at a meeting of the Standing Committee, a body consisting of equal numbers of union and management representatives who periodically meet to resolve grievances and other issues. That meeting's minutes, the accuracy of which is not disputed, recite:

> 7. [Respondent] reviewed the red circle provisions of the implemented contract. No wage reductions will take place for red circled employees until the next wage increase. Red circled rates will only receive 50% of future wage increases. Red circled employees will lose their rate only if they refuse to bid on posted jobs.

On August 16, 1991, Greenhalgh implemented that arrangement, authoring a memo to all employees ''explain[ing] the various procedures and plans associated with the reduction of Pulp Mill employees.'' Paragraph 6 of that memo states:

> Those employees who displace junior employees and remain in the mill will have their rates red circled. In future years, employee's rates that are red circled will only received 50% of future increases. They may also lose their rates if they refuse to exercise their seniority and bid on available jobs.

The General Counsel voices no objection in connection with the foregoing events. Shortly after they occurred, however, a change in chip dump handling procedures led Respondent to decide to reduce by two the number of Cat operators in that department. Although the Cat operator job classification was not eliminated, the two affected operators claimed that their wages should be red-circled, just as Respondent had red-circled those of employees whose jobs, but not job classifications, had been eliminated by the power boiler shutdown. Their claim led Respondent to reevaluate its decision to red-circle all power boiler employees.

Initially Respondent proposed that the Union agree to confine the August arrangement to employees adversely affected by the power boiler shutdown, thereby constructing a fence around them, and that subsequent reductions in force, including the one involving the two chip dump Cat operators, would again be governed by the above-quoted provision of Exhibit A, section I, subparagraph C,10. The Union rejected that proposal. By letter dated September 26, 1991, Greenhalgh advised the Union that Respondent intended to remove from the list of 37 power boiler employees the 7 whose job classifications had not been eliminated and who, consequently, had not been covered by the red-circle provisions of subparagraph C,10 of Exhibit A, section I: ''Accordingly, the people whose classifications were not eliminated, even though they may have five years of service, will have their rates reduced to the rate of the job they presently hold.''

The General Counsel contends that by removing the red-circle wage rates of those seven employees and of the two chip dump Cat operators, Respondent violated Section 8(a)(5) and (1) of the Act. In opposition, Respondent characterizes the August arrangement to red-circle the rates of the seven power boiler employees as a mere ''informal agreement'' that, in effect, was invalidated by the Union's subsequent unwillingness to ''neither confirm nor renew'' its limitation to power boiler employees. I reject that argument.

As described more fully in subsection III,C, infra, whatever the parties' interpretation of Exhibit A, section I, subparagraph C,10 had been prior to August, Greenhalgh admitted that Respondent, in effect, agreed in connection with the power boiler shutdown to interpret that contractual provision so that red-circle benefits would be extended to all employees adversely affected by reductions in force. That is a result not changed by characterizing that agreement as ''informal,'' for the Act imposed no formalities as a condition precedent for establishing that an agreement has been struck. Consequently, in August Respondent and the Union agreed to apply red-circle rate benefits to all employees adversely affected by a reduction in force, thereby effectively creating a term or condition of employment to which all such employees would be entitled.

To be sure, that agreement was not necessarily unlimited in duration. Like any noncontractual term and condition of employment, qualifications for red-circle rate benefits could be changed through the process of negotiations. However, a party is not free to utilize already conferred benefits of a term or condition of employment as a lever to extract changes or limitations in that employment term's prospective application. That is what occurred here. Greenhalgh conceded that Respondent's agreement with the Union allowed rates to be red-circled for all employees adversely affected by a reduction in force. Unhappy with that consequence of its agreement, Respondent sought to negotiate a limitation on the term and condition of employment resulting from that agreement, by restoring all qualifications enunciated in Exhibit A, section I, subparagraph 10,C. Unable to achieve agreement to that restoration, Respondent simply rescinded its August agreement and all benefits already conferred by its terms on employees. As a consequence, the seven power boiler employees and two chip dump Cat operators had their red-circle employment terms erased, as if Respondent had

never agreed to confer that benefit. In so doing, Respondent violated Section 8(a)(5) and (1) of the Act.

The third alleged violation of Section 8(a)(5) and (1) of the Act is that in September and, again, during the period between mid-October and December 1991, Respondent transferred unit mechanical, i.e., maintenance, work from unit pulp mill employees to nonunit sawmill employees, without affording the Union notice and an opportunity to bargain about those work transfers. There is no dispute that mechanical work transfers occurred during those months and, further, none about the fact that the work involved was maintenance work performed in the past by unit employees. However, Respondent argues that such transfers had been encompassed by the June–July negotiations and by the implemented changes which, urges Respondent, ''permitted [it] to reduce the number of maintenance mechanics and to subcontract and/or transfer maintenance mechanic work at its sole discretion.''

As discussed more fully in subsection III,D, infra, Respondent's argument is supported neither by testimonial nor documentary evidence. Indeed, the evidence shows that Respondent violated the terms of its own implemented final offer by transferring the mechanical work without ''prior conferral with the Union,'' as required by its implemented changes, and there is no showing of any past practice of transferring mechanical work to the sawmill on an ad hoc basis. Consequently, Respondent violated Section 8(a)(5) and (1) of the Act by the September and October–December 1991 transfers of mechanical work to the sawmill employees for performance.

The remaining two allegations that Respondent violated Section 8(a)(5) and (1) of the Act arise from events occurring in connection with one of the periodic temporary pulp mill shutdowns. In this instance, the shutdown lasted from approximately October 15 to after Christmas of 1991. The General Counsel does not challenge the propriety of that shutdown. However, during late October or early November 1991 a customer, C. Itoh Company, requested 5000 tons of pulp. Though Respondent explained that it would cost $200,000 to reopen the plant and close it again after production of that pulp, Itoh was unwilling either to pay that cost or, alternatively, to seek another supplier for its order without permanently taking its business elsewhere. Itoh's representative suggested that Respondent borrow the pulp. Acting on that suggestion, Respondent worked out an arrangement with a nearby competitor, Simpson Paper Company, to fill Itoh's order and, once Respondent's pulp mill reopened, to allow Respondent to fill a like order for Simpson. As a result, the latter filled the Itoh order in November and December 1991 and Respondent filled Simpson's like order in early 1992.

Respondent admits that those arrangements with Simpson had been made without any notice of them being given to the Union and without affording the Union an opportunity to bargain over disposition of work normally performed by employees that it represented. Because of Respondent's failure to do so, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by ''subcontract[ing] out an order for pulp product rather than recall Unit employees at the Pulp Mill to do this work.''

Respondent takes issue with that characterization, contending that the transaction had been merely an ''in-kind'' trade of produce, not a subcontracting of production, that was within the scope of its entrepreneurial prerogative. To support that contention, Respondent points out that an employer is under no obligation to accept specific orders from particular customers and that its decision to effect an in-kind trade was not one susceptible to the give-and-take of negotiations. Moreover, argues Respondent, it had a practice of engaging in such trades in the past and, in any event, the unit employees performed a like amount of work for Simpson Paper in 1992, with the result that they suffered no work loss in the final analysis.

For the reasons set forth in subsection III,E, infra, I reject Respondent's arguments. Respondent is under no obligation to operate a business at all, but having chosen to do so it must comply with all obligations imposed by law, including by the Act. Disposition of unit work is a mandatory subject of bargaining. Neither good-faith nor economic exigencies relieve an employer's obligation to give notice of, and an opportunity to bargain about, changes in mandatory bargaining subjects to its employees' bargaining agent before effecting changes in those subjects. The evidence does not support the past practice and no-loss components of Respondent's argument. Accordingly, I conclude that Respondent's failure to satisfy its statutory bargaining obligation in connection with Itoh's order violated Section 8(a)(5) and (1) of the Act.

The other allegation arising from the shutdown involves the pulp mill storeroom where four shipping and receiving department employees, denominated storeroom clerks, work during normal operations. They receive incoming supplies for all areas of Respondent's Samoa complex, they either deliver those supplies to their intended area of the complex or store them in inventory, and, in addition, they issue requisitioned materials from inventory upon presentation of an issue or order ticket by personnel from the various areas of the Samoa complex, as well as from other facilities operated by Respondent in Northern California.

During past temporary pulp mill shutdowns one storeroom clerk had been retained to continue receiving and storing or distributing supplies to areas of the Samoa complex that were not shut down. Respondent decided that during the 1991 pulp mill shutdown it would stop all supplies shipments to the extent possible, store in the sawmill area whatever shipments could not be stopped without actually storing those shipments' contents, and lay off all four storeroom clerks during the shutdown. The General Counsel does not contest the propriety under the Act of those particular decisions.

Since the sawmill remained in operation during 1991's final calendar quarter, supplies continued to be received for its operation. Moreover, periodically supplies needed to be withdrawn from inventory for areas that continued to operate, such as the office. Initially, the General Counsel alleged that Respondent violated the Act by, without giving prior notice and affording a bargaining opportunity to the Union, using ''supervisors and Saw Mill employees to do Unit work in the shipping and receiving Department of the Pulp Mill.'' But during the hearing, the General Counsel was allowed to amend that allegation to delete its specification of ''supervisors.''

With respect to that allegation as amended, the parties never litigated nor have they argued concerning performance of that work specifically by sawmill employees. Instead, they have litigated and argued about whether receiving and dis-

tributions from inventory had been made generally by personnel other than the storeroom clerks, most particularly by Sandra Swift, whose title is store supervisor, and by purchasing department buyer Phillip Sutter. Respondent contends that both of those individuals are statutory supervisors and, further, argues that there has been no showing of shipping and receiving work being performed during the shutdown by other than supervisors or contractors in any manner contrary to past practice. As discussed in subsection III,E, infra, the evidence does show that receiving and distribution of materials from inventory had been made by other than unit personnel during the shutdown and, moreover, in a manner not consistent with past practice. Inasmuch as Respondent concedes that it never notified the Union of those particular changed practices, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

B. *Notification that Local Rule 9 Would Be Eliminated*

As pointed out in subsection III,A, supra, although Respondent concedes that it never specifically proposed eliminating Local Rule 9's restriction during 1991's June-July negotiations, it argues that the thrust of its bargaining strategy and related proposals concerning manning restrictions should have put the Union on notice that the restriction of Local Rule 9 could not survive implementation of Respondent's final offer. Evaluation of that argument necessitates an examination of Respondent's bargaining strategy and of its proposals concerning continued performance of unit maintenance work by mill mechanics.

In the course of formulating its bargaining strategy prior to commencing negotiations, Respondent determined that it had been operating at a competitive disadvantage, because of its nearest competitor's greater latitude to subcontract work. In view of that fact, and in light of recent modernization of machinery that enabled it to operate with fewer people, Respondent formulated certain proposals to allow future operations to be conducted with a lesser number of unit pulp mill employees. The first one, to which the General Counsel voices no objection, increased the ability of supervisors to perform unit work.

More to the point of the complaint's allegation concerning Local Rule 9 is number 8 of Respondent's proposals submitted to the Union on June 11, 1991:

> 8. Section 21 and Exhibit A, section 11—Paragraph a—Revise seniority section and manning requirements for maintenance department to remove all restrictions on [Respondent's] right to determine manning or elimination of classifications.

The portion proposing a change in Ssction 21 of the 1988–1991 contract involves no issue in this case, since it pertains to production employees' promotion and progression ladders.

The second portion of Respondent's proposal 8, however, is material, for it refers to a contractual provision—correctly stated, Exhibit A, section II, subparagraph 9(a), on page 53 of the 1988–1991 contract—that concerns maintenance work:

> 9. Nothing in Section II or Section III shall be construed so as to (a) oblige [Respondent] to hire or retain any employee unless there is work for him, except maintaining maintenance crew strength at June 1, 1974, level so long as mill is in normal operation. . . .

The maintenance portion of Respondent's proposal 8 was targeted at eliminating that 1974 floor for maintenance crew numbers.

Obviously, neither Exhibit A's above-quoted language nor Respondent's proposal 8 make any specific reference to Local Rule 9. Moreover, from the face of those two contractual provisions, elimination of the 1974 maintenance crew floor would not, of itself, obviate Local Rule 9's separate prohibition against laying off mill mechanics where work that they could perform was being contracted. However, both parties presented evidence concerning discussion of Local Rule 9 during the course of the negotiations in June and July 1991.

For the General Counsel, Area Representative Robert W. Crane testified that Local Rule 9 had been discussed at more than one negotiating session and that, during those discussions, the Union had expressed willingness to agree to Respondent's proposal 8 so long as the restriction of Local Rule 9 was strengthened. According to Crane, Respondent's principal negotiator, Beincourt, had rejected that counterproposal, in the process stating expressly that Respondent preferred the language already recited in Local Rule 9. Yet, both in connection with that description and in the course of testifying about other subjects, Crane did not appear to be testifying candidly. That appearance is strengthened by a review of the record of his testimony which shows an almost total inability to provide coherent and detailed descriptions of events, including specifically his generalized assertions about what had occurred with respect to discussions of Local Rule 9—generalized assertions which Respondent's witnesses effectively denied having taken place. Additionally, Crane's generalized claims about discussions of Local Rule 9 during negotiations were not corroborated by other members of the Union's negotiating team, though Respondent's questioning showed that many, if not all, of them were present during the hearing. Accordingly, I place no reliance of Crane's testimony concerning what had been said about Local Rule 9 during negotiations in the summer of 1991.

Nevertheless, the testimony of Respondent's witnesses does show that in the course of discussing Local Rule 9 during negotiations, Beincourt had specifically rejected the suggestion that Local Rule 9 was affected by Respondent's above-quoted proposal 8. Thus, Beincourt testified that when he had been asked by the Union's negotiators, during the session on June 21, 1991, if Local Rule 9 ''Wouldn't . . . prohibit you from contracting out maintenance levels,'' he had read the rule and, then, had responded that it ''wouldn't apply to prevent us from subcontracting maintenance work because if we eliminated the job, people wouldn't be on layoff, would they?''

Similarly, Industrial Relations Manager Greenhalgh testified that, when asked at that negotiating session about the effect of Local Rule 9 on Respondent's proposed elimination of the 1974 manning floor, Beincourt had said that Local Rule 9 ''wouldn't have any bearing at all on our proposal.'' In like vein, Employment Manager and Housing Manager Oscar Filgas testified that after Beincourt had ''reiterated our position that we still intended to'' remove ''all language related to . . . 1974 manning levels,'' and after Crane had read Local Rule 9 aloud, Beincourt had eventually responded that

the rule ''wouldn't be applicable, anyway, because there would be no maintenance levels.'' Based on the three accounts of these officials of Respondent, the evidence shows that Respondent specifically had told the Union that Local Rule 9 was not affected by Respondent's proposals. Moreover, Beincourt, Greenhalgh and Filgas each testified that Local Rule 9 had not been discussed at any negotiating session other than on June 21. Consequently, whatever the general thrust of Respondent's bargaining strategy and regardless of the proposals actually made by Respondent, Beincourt had specifically told the Union during negotiations that Local Rule 9 would not be affected by Respondent's bargaining proposals and objectives. As a result, there is no basis for concluding that the Union should have understood from the general thrust of bargaining that Respondent's actual proposals reasonably contemplated removal of Local Rule 9's restriction.

Indeed, any remaining force to such an argument is erased altogether by Respondent's admitted reason for having chosen to send the letter of August 8, 1991. Beincourt testified that, after having sent his notice of intent to implement Respondent's final offer by letter of July 31, 1991, he had received a report that employees had been saying that subcontracting mill mechanics' work could be blocked by the continued existence of Local Rule 9. In view of that report, testified Beincourt, ''to follow the safer course, we decided that we needed to put out a letter immediately'' concerning Respondent's position on Local Rule 9. Thus, he authored the letter of August 8, 1991, quoted in pertinent part in subsection III,A, supra. That letter's assertion that Local Rule 9's elimination had been contemplated by the June–July negotiations is directly contradicted by Respondent's own officials' admission regarding what Beincourt had told the Union about Local Rule 9 on June 21. Further, had Beincourt truly believed a month and a half later that the rule had been reasonably comprehended by the negotiations, it seems meaningless for him to have again conveyed such a message specially to the Union when, so far as the evidence shows, no similar clarification was ever issued concerning any other implemented term.

In fact, rather than simply pursuing a ''safer course,'' Respondent appears to have sent the letter of August 8, 1991, because the employees' statements had led it to re-evaluate the effect of Local Rule 9's restriction on its actual proposals. Having done so, it appears to have concluded that it may too hastily have rejected the possible impact of that rule's restriction as an obstacle to its above-described bargaining strategy. Thus, it set out to correct the problem, in the process trying to portray the belated change as no more than a clarification, instead of a change. However, as concluded above, Beincourt's letter did announce a change. Respondent was not at liberty to try to perfect its bargaining strategy by simply adding at the last minute a change to a provision whose significance it had previously overlooked. Under the Act, a party to negotiations is not free to ''exceed[] its last offer,'' *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 13 fn. 11 (9th Cir. 1981), by belatedly adding changes to repair earlier omissions without giving the other party ''a chance to discuss the specifics of any proposal before it is implemented.'' *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981).

As pointed out in subsection III,A, supra, Respondent argues that there had been an understanding that either party was free to make changes before the employees ratified agreement on all terms for a contract. That had not occurred when Beincourt's letter had been sent. Yet, Respondent's conduct in connection with its announcement that Local Rule 9 would be eliminated was not consistent with Beincourt's uncontroverted description of how that understanding was to operate. During negotiations, Beincourt testified, he had proposed that any party would be free to make changes prior to ratification and,

> Mr. Crane didn't have any problem philosophically with that position, but he insisted that his words were something to the effect of, ''Well, let's not do it through letters. Call us back or we'll call you back, if there's any issue that needs to be clarified.['']
>
> We have to call the other party back to the bargaining table. We agreed to do that.

But on August 8, 1991, Beincourt followed the very course that he admitted had been understood would not be followed in making proposed changes. Rather than refraining from announcing the change by letter and, instead, calling the Union to notify it of Respondent's decision to add Local Rule 9's elimination to the list of changes to be implemented, Beincourt sent a letter to Crane and Miller. He never claimed that he had even tried to call Crane in connection with that addition. Accordingly, whatever force it might derive in other circumstances from this understanding with the Union, Respondent cannot rely on an understanding whose very procedure it concededly disregarded.

Respondent further argues that before eliminating Local Rule 9's restriction, it had offered an opportunity for the Union to resume negotiations and discuss abolishing that rule. In so arguing, Respondent points to the above-quoted final paragraph of Beincourt's letter of August 8, 1991. Yet, this argument is not as persuasive as Respondent urges. Although the Union never challenged Respondent's assertion in Beincourt's letter that Local Rule 9's elimination was consistent with Respondent's overall bargaining position and never accepted Respondent's offer to meet for discussion about it, neither the assertion nor the offer is as appealing as they might facially seem. First, as discussed above, Local Rule 9's elimination was not ''consistent with [Respondent's] position at the table,'' and, as participants in the negotiations, the Union's representatives were well aware that such a statement misrepresented Respondent's admitted earlier position that its proposals did not affect Local Rule 9's continued viability. By virtue of that blatant misrepresentation, Respondent naturally called into question the good faith of its own expression of willingness to bargain about the belated addition to its list of intended changes.

Of perhaps greater significance, Beincourt's letter states that Respondent intended to effect ''implementation [of its final offer] on August 10th.'' At no point in that letter, nor by any other means so far as the evidence shows, did Respondent offer to delay implementation of its final offer, nor at least of its intent to abolish Local Rule 9, until such time as the Union had an opportunity to evaluate the effect of that rule's elimination, formulate a bargaining position regarding that subject, and engage in meaningful bargaining with Respondent concerning this belated announcement. Two con-

sequences flow from that circumstance. First, the letter left the Union with less than 48 hours to fulfill its bargaining obligation to unit employees, by trying to prepare for and engage in meaningful negotiations concerning the rule's announced abolition. In fact, Beincourt's letter was not faxed to Crane and hand-delivered to Wilson until around noon of August 8, 1991, thereby leaving the Union with but a single full workday before ''implementation on August 10th.''

Crane's office is in Walnut Creek, California, over a hundred miles south of the Samoa pulp mill. At the time, Beincourt's office had been in Portland, Oregon, well to the north of that pulp mill. As a result, this was not a situation where Crane could simply walk across the street or drive a few miles down the road to meet with the Union's officers, and perhaps some of the unit employees, to discuss the rule's announced elimination and, then, to immediately discuss its elimination face to face with Beincourt and Respondent's other representatives. In sum, the timing of the announcement hardly accorded ''adequate time [for the Union] to consider and respond to [Respondent's] proposal[].'' *Southwest Forest Industries v. NLRB*, 841 F.2d 270, 273 (9th Cir. 1988).

A second, independent, consequence of the abbreviated time between Beincourt's announcement of Local Rule 9's elimination and implementation of that change on August 10, 1991, is that the letter created the appearance, if not the reality, that bargaining about the added change would be futile—that Respondent was simply going through the motions of offering to bargain about an already finalized decision to implement an additional, and belatedly announced, change at the same time that it implemented the previously and lawfully announced changes in the attachment to Beincourt's letter of July 31, 1991. In other words, in the circumstances ''the unilateral change was effectively implemented when it was announced,'' *ABC Automotive Products Corp.*, 307 NLRB 248 (1982), and Respondent had no intention of bargaining with an open mind about its possible retention.

To be sure, properly conducted negotiations about elimination of Local Rule 9's restriction might not have yielded, in the end, an agreement concerning Respondent's proposed change. Yet, in the circumstances, any conclusion about the outcome of any negotiations about the rule's restriction, had Respondent given proper notice of willingness to undertake them, is speculative. Respondent is the party that belatedly announced the additional change in employment terms. It has not shown that its abrupt reversal of position concerning continued viability of Local Rule 9's restriction would not have generated a counterproposal and could not have led to meaningful negotiations concerning continuation or modification of the restriction embodied in Local Rule 9. In sum, there is no basis in the evidence for concluding that proper notice, and a properly afforded opportunity to engage in meaningful bargaining about the addition of Local Rule 9 to Respondent's list of changes to be implemented, would not have led to further negotiations between the parties.

For the foregoing reasons, I conclude that a preponderance of the evidence does not establish that the Union's nonresponse to the letter of August 8, 1991, constituted a waiver of its right to adequate proper notice and an opportunity to bargain about elimination of Local Rule 9's restriction. Therefore, I conclude that Respondent's belated addition of that restriction's elimination to the list of already announced changes to be implemented on August 10, 1991, violated Section 8(a)(5) and (1) of the Act.

C. *Change in the Red-Circle Rate Benefit*

As described in subsection III,A, supra, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by changing an agreed-on red-circle procedure in a manner that deprived employees of a benefit they had already earned as a result of that agreement. This particular allegation requires examination of essentially three areas: past interpretation of Exhibit A, section I, subparagraph C,10 of the 1989–1991 contract, discussions conducted by the parties in mid-August 1991 regarding red-circling, and bargaining that occurred after the chip dump Cat operators' claim had arisen.

As to the contractual provision itself, there is no evidence that it had been interpreted to apply in favor of employees who job classification had not been eliminated by a reduction in force. Thus, Exhibit A, section I, subparagraph C,10 begins by applying its terms only to situations where Respondent ''permanently eliminates an established regular job classification.'' There is no evidence whatsoever of past instances where that qualification had been disregarded whenever particular employees' jobs had been eliminated. Nor is there any evidence that an interpretation eliminating that qualification had been the subject of previous negotiations, much less that there had been a prior understanding by the parties to, in effect, tacitly rewrite that threshold qualification out of Exhibit A, section I, subparagraph C,10.

In an apparent effort to supply such evidence, Crane testified that during negotiations in July 1991, Greenhalgh had asked for the Union's interpretation of the red-circle rate contractual provision, Miller had replied that it applied to employees with more than 5 years' service who lost their jobs because of a closure, and Greenhalgh had said that also was Respondent's position. Then, testified Crane, at a meeting ''around August 5,'' Greenhalgh once more had agreed to the Union's assertion that wages would be red-circled for all employees with more than 5 years' seniority whenever there was a closure. However, Crane's convenient description of these events appeared no more reliable than his assertions concerning discussions about Local Rule 9 during negotiations, as described in subsection III,B, supra.

At the outset, there simply is no corroboration for Crane's testimony about these asserted red-circle rate conversations. Most particularly, though present during the hearing, Miller never confirmed having participated in the July conversation described by Crane. Furthermore, while Employment Manager and Housing Manager Filgas testified that the subject of red-circling had been discussed at a Standing Committee meeting on July 9, 1991, there is no evidence that Crane had attended that, or any other, Standing Committee meeting. Nor is there any objective evidence that those Standing Committee discussions had been pursued into the concurrently occurring negotiating sessions, as Crane seemed to be trying to claim. Accordingly, I conclude that a preponderance of the evidence does not support an argument that there had been an historic understanding that, despite its express terms to the contrary, Exhibit A, section I, subparagraph C,10 would be interpreted to allow rates to be red-circled even for employees whose job classification had not been eliminated.

As Respondent points out in its brief, however, ''accounts of the July 9 Standing Committee meeting [have] little, if any, bearing on the issue,'' because, ''The main crux of this case concerns the agreement reached by the parties at the August 14 Standing Committee meeting.'' Moreover, Respondent concedes that the substance of that particular agreement did remove the requirement of job classification elimination as a condition for receiving red-circle rate treatment. However, as described in subsection III,A, supra, Respondent contends that only an ''informal agreement'' concerning that subject had been reached on that date. Yet, as pointed out in that subsection, the Act does not differentiate agreements by type and, then, grade their significance based on the particular type of agreement at issue. Absence of accompanying ruffles and flourishes does not accord second-rate status to a particular agreement, so long as one was reached, under Section 8(d) of the Act.

A more significant consideration is the scope of the red-circle agreement reached by the parties in August 1991. To be sure, it arose as a result of Respondent's closure of power boilers and associated equipment. Moreover, while item 7 of the Standing Committee minutes for its meeting of August 14, 1991, quoted in subsection III,A, supra, recite that, ''No wage reductions will take place for red circled employees,'' those minutes also show that the discussions during that meeting had pertained to the boiler shutdown. Consequently, there is some basis for concluding that the red-circle agreements had been confined only to the 37 employees affected by that shutdown.

However, Greenhalgh conceded that the August agreement had not been so limited by the parties themselves. For, he testified that after the two chip dump Cat operators had claimed the benefit of that agreement, he had reported to his superiors ''that we had probably provided a benefit that . . . some of the employees weren't entitled to under the [expired collective-bargaining] agreement,'' by providing red-circle protection to employees ''who had lost their jobs, but their classification had not been eliminated.'' Moreover, it is undisputed that Respondent had then set out to negotiate modification of that August red-circle agreement so that it would apply no further than to the 37 power boiler and associated equipment employees. As a result, Respondent's own admissions and course of conduct establish that it had understood its agreement with the Union in August 1991 to extend to all employees whose jobs would be eliminated, not merely to those who lost jobs as a result of the power boiler and associated equipment shutdown.

Apparently, Respondent had made the red-circle agreement under the mistaken belief that it simply had been abiding by the expired contract's Exhibit A, section I, subparagraph C,10. Yet, there is no evidence that the Union had misled Respondent into such a belief. Nor is there evidence that the Union had been aware of Respondent's subjective impression. Respondent's bargaining obligation has not terminated as a result of the contract's expiration and implementation of its final offer. As ongoing events affecting unit employees arose, Respondent had a continuing obligation to negotiate about their effects on employees represented by the Union. The fact that, in the course of doing so, Respondent offered an employment term more beneficial to employees than the contractually specified one did not oblige the Union to challenge or contest that offer. Nor, given the myriad reasons that parties make proposals, did such an offer serve as some form of notice to the Union that, in effect, Respondent did not know what it was doing in making such a proposal. A party to negotiations is entitled to assume that the opposing party is competent to understanding the consequences of its own proposals. Accordingly, the Union cannot be faulted for accepting at face value Respondent's red-circle rate offer, even though it turned out that, from Respondent's perspective, it created a less than desirable situation. The Union's agreement to that proposal created a term and condition of employment that Respondent was obliged to continue honoring.

Of course, since the August red-circle rate agreement had not been a contractual one, Respondent remained free thereafter to give notice that it wanted to modify that agreement by resurrecting all qualifications enumerated in Exhibit A, section I, subparagraph C,10. However, a party is not free to hold hostage already conferred benefits as a device for compelling the other party to accept future changes in those benefits. That is, an employer cannot withhold employees' wages for past work, for example, to extract their bargaining agent's agreement to a wage reduction for future work. In the final analysis, that is what occurred here.

Respondent admittedly made a broad agreement to red-circle rates for employees whose jobs were eliminated, without regard to elimination of their job classifications. Nine employees—seven power boiler and associated equipment employees and two Cat operators—qualified for that benefit before Respondent returned to the Union and proposed restoring all contractual conditions for red-circle rate benefits. Respondent was free to pursue that course of conduct. It was also free to implement that proposal in the future, once it had bargained in good faith to a legitimate impasse. But, the Act does not allow a party to rescind and withdraw benefits earned prior to agreement or impasse. Nor does it permit a party to utilize withdrawal of already earned benefits to lever concessions from the other party in negotiations. Therefore, by rescinding the red-circle rate benefits already conferred by the August 1991 agreement, Respondent violated Section 8(a)(5) and (1) of the Act and, furthermore, inherently tainted the bargaining and any impasse that otherwise would have resulted from those negotiations.

D. *Performance of Unit Maintenance Work by Sawmill Employees*

It is undisputed that Respondent never gave prior notice to the Union in September 1991 when it sent a store's forklift for transmission overhaul and, also during that same month, a heavy Cat loader for repairs by nonunit sawmill employees. Similarly, during December 1991, without prior notice to the Union, three pulp mill 988 Cat loaders were repaired by nonunit sawmill employees. Although major mechanical work on pulp mill machinery had been ordinarily performed by independent contractors, prior to September 1991 less major mechanical work on the pulp mill's machines had been performed by three mechanics and one serviceman employed in the pulp mill and included in the bargaining unit. As a result, it is undisputed that the above-described forklift and loader repair works had been performed ordinarily by employees in those job classifications.

The General Counsel alleges that by allowing unit work to be performed by nonunit employees without prior notice to

the Union, and affording it an opportunity to bargain about that subject, Respondent violated Section 8(a)(5) and (1) of the Act. Respondent argues that under its implemented employment terms, enumerated in the attachment to Beincourt's letter of July 31, 1991, Respondent had been allowed to transfer mechanical work to nonunit employees. However, as stated in subsection III,A, supra, the evidence does not support what, in effect, is a plea in avoidance. In the first place, no official of Respondent ever testified as to the reason for having chosen to have that repair work performed by nonunit sawmill employees. Consequently, there is no testimony supporting Respondent's argument that the repair work transfers had been made pursuant to the terms of Respondent's implemented offer. Nor, for that matter, is there evidence that the implemented terms had even been considered before any of those equipment transfers had been made.

Aside from that fact, the evidence shows that those work transfers to the saw mill had not been made in conformance with the terms of Respondent's final offer. In making that argument, Respondent points to the 14th paragraph of the attachment to Beincourt's letter. In pertinent part, that provision states: ''Provide that [Respondent] has the sole right, *after prior conferral with the Union*, to eliminate or change jobs on progression ladders and to vary manning levels within the maintenance trades.'' (Emphasis added.) Inasmuch as Respondent acknowledges that it never had given notice to the Union before sending the forklift and loaders to the sawmill for repair by nonunit employees, it obviously failed to satisfy the italicized requirement of item 14 of its own implemented offer. In consequence, that implemented change cannot stand as a defense to the unilateral change in performance of repair work by unit employees.

Nor can it be persuasively maintained that sending unit maintenance work to the sawmill had been somehow consistent with Respondent's general bargaining strategy concerning maintenance work and that the Union should have understood as much. As discussed in subsection III,B, supra, although Respondent's general bargaining objective had been to operate with fewer employees, it had chosen generally to do so by expanding the ability of statutory supervisors and contractors to perform unit work. So far as the evidence discloses, at no point did Respondent's negotiators even suggest the specific possibility that unit work would be transferred to nonunit employees as a means of operating with fewer employees.

To be sure, Respondent's eighth proposal, quoted in subsection III,B, supra, seems to allow removal of all restrictions on Respondent's ''right to determine manning'' for the maintenance department. Yet, that proposal was made in the context of a specific proposal to remove the 1974 maintenance floor imposed by Exhibit A, section II, subparagraph 9(a), as also quoted and discussed in subsection III,B, supra. Consequently, a respectable basis exists for concluding that, independent of that 1974 crew floor, proposal 8 did not contemplate transfers of unit work to nonunit Samoa complex employees. In any event, that proposal was implemented by the attachment's above-quoted item 14 and, as pointed out above, the forklift and loaders were transferred to the sawmill for maintenance without compliance with the implemented term's required ''prior conferral with the Union.'' Accordingly, by its own disregard of that requirement, Respondent fouled the nest of any argument based on the employment terms that it implemented on August 10, 1991.

Before concluding this discussion, one further point is worth mentioning. As described in subsection III,A, supra, the pulp mill had been closed temporarily from mid-October to late-December 1991. As a result, the three mechanics and one serviceman had not been working when the three 988 Cat loaders had been transferred for repair to the sawmill. However, unilateral action ''interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.'' *May Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). By proscribing unilateral action, the Act ''prevent[s] the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them.'' *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). Those policies, and the harm which they are intended to prevent, are not altered in any fashion by the fact that represented employees happen to be temporarily laid off at the time of the employer's unilateral action.

During the shutdown, Respondent had periodically recalled one of the unit's storeroom clerks to perform needed work and had recalled three of those clerks before the shutdown's conclusion to perform certain work. There is no basis for concluding that Respondent could not at least have bargained with the Union and given it the opportunity to propose a similar or other course of action concerning repair of the 988 Cat loaders. And, of course, there had been no temporary shutdown in progress at the time that the forklift and heavy Cat loader had been transferred to the sawmill for repair in September 1991.

Continued performance of unit work is a mandatory bargaining subject, *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203 (1964), subject to certain qualifications not applicable here. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Therefore, I conclude that by having failed to give notice and an adequate bargaining opportunity to the Union before transferring machinery to the sawmill for repairs ordinarily performed by unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.

E. *Events During the 1991 Pulp Mill Shutdown*

As described in subsection III,A, supra, from mid-October until after Christmas 1991, Respondent's pulp mill had been closed. During that closure Respondent filled an order for pulp by having a competitor supply it. In early 1992, it filled one of that competitor's order for a like amount of pulp. Respondent acknowledges that it gave no prior notice and bargaining opportunity to the Union with regard to that arrangement. Based upon these facts, the General Counsel alleges that Respondent unilaterally subcontracted unit work in violation of Section 8(a)(5) and (1) of the Act.

As pointed out in subsection III,A, supra, Respondent takes issue with that characterization, arguing that the transaction had been an in-kind product trade, not a subcontract of work. Yet, such a characterization is no more than a word game. Regardless of how the transaction is characterized, it resulted in the movement of work ordinarily performed by Respondent's unit employees to employees not employed in the bargaining unit at Respondent's pulp mill. As a result, unit employees were deprived of income during late 1991 from work that they ordinarily performed. Continued per-

formance of unit work is a mandatory subject of bargaining, as pointed out in subsection III,D, supra. Accordingly, regardless of the label affixed to the transaction, Respondent failed to satisfy the statutory obligation to give the Union notice of and an opportunity to bargain about the mandatory subject of unit work performance.

While Respondent does not actually challenge that general proposition, it advances arguments that, it contends, establish that the pulp trade fell within a limitation or exception to the general proposition that notice, and an opportunity to bargain, must be provided before specific unit work can be transferred to nonunit employees. First, Respondent argues that it is under no obligation to accept specific orders from specific customers and, inferentially, that it had no obligation to bargain about doing so in any particular instance, such as with respect to the order from Itoh. As far as it goes, that argument is correct. However, the General Counsel is not alleging that Respondent failed to bargain about whether or not to accept Itoh's order. Rather, the allegation is that Respondent failed to satisfy a bargaining obligation that arose from events that followed as a consequence of Respondent's decision to accept that pulp order. After all, Respondent is under no obligation to continue operating a business. But having chosen to do so, it is required to observe obligations imposed by the Act. So too, having accepted Itoh's order, it is obliged to follow the Act's restrictions with respect to filling that order.

A facially more compelling argument is that it would have been too expensive to reopen the pulp mill to process Itoh's order and, consequently, that Respondent made a good faith business decision to effect a product trade for which no alternative could have been provided realistically through the bargaining process. Yet, it is settled that unlawful unilateral action is not excused by a claim of ''good faith nor [a] claim of economic justification,'' *NLRB v. Amoco Chemicals Corp*., 529 F.2d 427, 432 (5th Cir. 1979), nor will it be excused by ''the emergency nature of the situation.'' *NLRB v. Hondo Drilling Co*., 525 F.2d 864, 867 (5th Cir. 1976), cert. denied 429 U.S. 818.

It may well be that, even had Respondent satisfied its statutory obligation of affording notice and a bargaining opportunity to the Union, negotiations would have yielded no alternative course of action for providing pulp to Itoh, in light of the costs of reopening and reclosing the pulp mill. However, in light of the merely generalized evidence concerning that subject, the record provides no basis for concluding with any certainty that no such alternative course could have been developed as a result of negotiations—at least to the extent that only some, if not all, unit employees could have earned income from providing pulp for Itoh in late 1992.

Certainly, Respondent has produced no evidence that it would have suffered any economic detriment from passage of the time needed to notify the Union of Itoh's order and, if a timely request to promptly discuss it had been received from the Union, to bargain about the ability of unit employees to perform at least some of the work needed to fill it. Of course, unit employees were paid for filling Simpson's like order in 1992. However, that fact is not so compelling a consideration as Respondent now seeks to portray it. As every creditor appreciates, timing of money's receipt is a material consideration. Thus, the fact that employees received income for work performed in early 1992 does not erase detriment they suffered as a result of not having been provided with an opportunity to bargain about possibly earning it in late 1991.

Beyond that consideration of timing of income receipt, there is no evidence that the existence of Simpson's order had any effect whatsoever on the unit employees' return to work at the end of 1991, nor on their ability to work continuously thereafter during early 1992. That is, Respondent presented no evidence showing that the back side of its arrangement with Simpson had led to earlier recall of the pulp mill employees than would otherwise have occurred. Similarly, Respondent presented no evidence to show that but for the need to fill the order for Simpson, unit employees would not have been able to work continuously during 1992's first calendar quarter. Accordingly, there is no evidence that the existence of the need to fill Simpson's order had enhanced unit employees' employment opportunities.

It must be kept in focus that, in the final analysis, the Act does not oblige Respondent to succeed in negotiating an arrangement satisfactory to the Union and the employees that it represents. Instead, Respondent had been obliged to do no more than offer a bargaining opportunity to the Union and, within reason, try to negotiate a mutually satisfactory arrangement. See generally *Foodway*, 234 NLRB 72, 77 (1978). Respondent has presented no evidence showing that it would have suffered any detriment by having taken those steps. In contrast, as pointed out in subsection III,D, supra, unilateral action undermines a bargaining agent by conveying the message that it is powerless to protect employees and ''that there is no necessity for a collective bargaining agent.'' *May Stores Co. v. NLRB*, supra.

Finally, Respondent argues that the pulp transaction arranged with Simpson had been consistent with a practice of past product and material trades with competitors to which the Union had never voiced any objection. Yet, waiver of the statutory bargaining obligation is not established merely by a bargaining agent's past failure to object to similar unilateral conduct. See, e.g., *Ciba-Geigy Pharmaceuticals Division v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983). Furthermore, Respondent has presented no evidence whatsoever that the Union had even been aware of whatever past trades had been made by Respondent and its competitors. The absence of such evidence nullifies any contention that past failures to protest those trades constitutes a waiver and establishes a past practice allowing them to be effected in the future without affording the Union prior notice and an opportunity to bargain about them.

In addition, there is no particularized evidence of past material and product trades of the magnitude of the 5000-ton pulp trade arranged with Simpson. Pulp Mill Manager Martin provided a generalized account to the effect that past trades had occurred. But he gave no more than a generalized description of items involved and circumstances under which those trades had taken place. At no point does his testimony about those incidents show that they had been similar in magnitude to the volume of pulp involved in Respondent's arrangement with Simpson.

Therefore, I conclude that a preponderance of the evidence establishes that Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and offer to bargain with the Union about performance of unit work by nonunit employees before arranging to have Simpson perform unit work. That

leaves for consideration in connection with the temporary shutdown the allegation involving the work of the pulp mill shipping and receiving department during it. As set forth in subsection III,A, supra, the General Counsel does not challenge Respondent's decision to layoff all four storeroom clerks during the pulp mill's 1991 shutdown. Nor does the General Counsel contend that Respondent violated the Act by deciding to stop deliveries of pulp mill supplies during that shutdown. Finally, while there is evidence of occasional removal by supervisors of items from inventory, the General Counsel was permitted to withdraw the supervisory portion of this allegation. That leaves three areas for evaluation.

First, although it is not altogether clear, the General Counsel appears to contest the decision to store whatever supplies were received, because their delivery could not be stopped, for the storeroom. The record shows that these deliveries were taken to a central location where they were stored until three storeroom clerks were recalled immediately before Christmas, before the other pulp mill employees, to distribute those supplies. In addition, one storeroom clerk had been recalled on three earlier days during December 1991 to handle then-needed supplies' distributions from that central location. To the extent that the General Counsel may be arguing that Respondent violated the Act by storing supplies delivered during the shutdown, rather than return a storeroom clerk to handle and distribute them immediately upon receipt, I do not agree.

Obviously, the layoff of all storeroom clerks for the shutdown's duration meant that there would be no one to receive shipments as they were delivered. Yet, the complaint includes no allegation that the decision not to retain one clerk, as in the past, had been unlawfully reached or implemented. Indeed, so far as the evidence discloses, Respondent had satisfied its bargaining obligation by notifying the Union that it intended to layoff all four clerks. Moreover, unlike the above-described situation regarding Respondent's arrangement with Simpson, there is no evidence that the clerks ultimately lost any work as a result of this particular facet of the shutdown. Incoming materials were simply stored and, when the clerks returned, they distributed items from that central location to their appropriate destinations within the Samoa complex. As a result, the clerks, not someone else, ended up performing that work and being paid for the work of recording and breaking down those shipments of supplies and, then, distributing them.

Second, notwithstanding the above-described general arrangement, not all incoming supplies had been delivered to that central location. The General Counsel presented 17 invoices for shipments of sawmill supplies that had been delivered to the Samoa complex during the 1991 shutdown. Lead Stores Clerk Glen Vickers testified ''that particular set of documents reflects material that would have come to [the clerks] and been distributed'' by them in cartons that ''we would not open,'' but ''would take [them] and load [them] in a van and deliver'' them to the appropriate location within Respondent's complex. Respondent does not dispute that it had not notified the Union and given it an opportunity to bargain about direct delivery of those supplies to the sawmill during the shutdown.

Respondent did point out that each of the 17 invoices had been addressed to No. 1 L-P Drive, which is the address of the Samoa complex, rather that to the pulp mill or storeroom. Yet, Respondent presented no evidence that, in fact, those materials had been delivered directly to the intended destination within the complex, rather than to the storeroom or to the designated central location from which distribution of them had been undertaken by nonsupervisory, nonunit personnel. Employment Manager and Housing Manager Filgas did testify that supplies addressed to No. 1 L-P Drive sometimes are delivered by carriers directly to the location within the Samoa complex where they are to be used. However, he admitted that he did not ''have first hand knowledge of how the material comes to the saw mill.'' More specifically, Filgas did not claim to know how the supplies covered by the 17 invoices had gotten to the sawmill.

To be sure, Respondent might have rerouted supplies deliveries directly to the sawmill for the shutdown's duration. Yet, Respondent presented no evidence to that effect. As a result, so far as the record shows, there were 17 sawmill supplies deliveries received during the 1991 shutdown, those supplies ordinarily were received and distributed to the sawmill by unit employees, and someone else, not shown to be a supervisor, had received and distributed supplies from those 17 shipments, without prior notice to the Union that a change in ordinary receiving and distributing procedure would be occurring during the shutdown.

Finally, during their normal working hours of 7 a.m. to 3:30 p.m. the storeroom clerks distribute requisitioned items to personnel upon presentation of an issue or order ticket by them. During other hours, when no unit storeroom clerks are working, supervisors and nonsupervisory personnel obtain a stores key from a guard and go into the storeroom from where they pick out needed item(s). There is evidence of off-hours pickups from inventory stores during the shutdown. However, since it had been established practice for personnel to remove items from the storeroom from 3:30 p.m. to 7 a.m., when storeroom clerks are not working, no violation of the Act can be based on continuance of that practice during the shutdown.

There is, however, evidence of several items being removed from the storeroom, or perhaps from the central location where supplies were being received and stored during the shutdown, between the hours of 7 a.m. and 3:30 p.m. during the shutdown. Store Supervisor Sandra Swift admitted that she had ''filled a few orders'' between those hours on November 7 and 18, 1991. Buyer Phillip Sutter testified that he had filled some orders from inventory, most after 3:30 p.m. However, he did not claim that six other orders had been filled by him at times other than between 7 a.m. and 3:30 p.m. during the shutdown. Nor did Respondent present any other evidence that Sutter had filled those six orders other than between those daytime hours when the storeroom clerks ordinarily work. In addition, two other orders, one involving Gary Bernardi and the other Bill Manson, had been filled from inventory during the shutdown. There is no evidence that those two orders had been filled before 7 a.m. or after 3:30 p.m. Nor did Respondent contend that, on those occasions during the shutdown, either Bernardi or Manson had been a statutory supervisor.

Respondent does contend that both Swift and Sutter had been statutory supervisors and, by virtue of the deletion of supervisors from the General Counsel's allegation, that their removal of inventory items had not given rise to a violation of the Act. To support that supervisory contention regarding

Swift, she testified generally that she possessed authority to discipline employees. But, Respondent presented no particularized evidence that she ever had done so and she acknowledged that she never had actually disciplined anyone. While she testified that she scheduled the four storeroom clerks and one salaried person, presumably Sutter, the clerks all work a regular 7 a.m. to 3:30 p.m. schedule and Respondent presented no evidence that Swift had ever told any of the clerks when to perform particular tasks. After testifying that she possesses authority to ask employees to work overtime, Swift acknowledged that before doing so, ''I normally would get an okay through someone else'' in the maintenance department. Moreover, there is no evidence that her asserted authority to grant vacations, as well as days and other time off, is more than ministerial. Consequently, the evidence is not sufficient to establish that Swift had been a supervisor within the meaning of Section 2(11) of the Act.

Even less persuasive is Respondent's contention that Sutter had been a statutory supervisor at all times material. In the final analysis, that contention rests solely on his testimony that he relieved Swift whenever she was absent from Respondent's facility. Since I have found that she is not a statutory supervisor, the fact that he relieves her hardly suffices to establish supervisory status under Section 2(11) of the Act. Furthermore, even if Swift had been a statutory supervisor, there is no evidence whatsoever that she is absent from Respondent's facility with any regularity and that he fills in for her other than occasionally. Additionally, there is no evidence that, when doing so, Sutter exercises, or had possesses authority to exercise, independent judgment in connection with the supervisory powers enumerated in Section 2(11) of the Act. Consequently, as is true of Swift, Respondent has failed to present evidence supporting its assertion that Sutter had been a statutory supervisor at all times material.

A somewhat facially more appealing contention advanced by Respondent is based upon the undisputed fact that it would have taken no more than 20 to 30 minutes to fill any one of the above-mentioned orders and, in some instances, no more than a few minutes. In short, argues Respondent, the filling of these orders by nonunit personnel had been only a minor matter. ''The Board has recognized that not every minor unilateral change in working conditions constitutes an unfair labor practice.'' *Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991). ''For a unilateral change to be unlawful, it must be 'material, substantial, and significant.''' (Footnote omitted.) *Litton Systems*, 300 NLRB 331 (1990). Standing alone, a total of 11 instances of less than 30 minutes each—a total of less than 6 hours—spent filling orders during a 2-month period would appear to qualify as not being ''material, substantial and significant.'' Yet, evidence of filling orders from stores does not stand alone as the only shipping and receiving department employees' work performed during the 1991 shutdown.

As described above, supplies from 17 shipments had also been received and taken to locations within the Samoa complex. That also is work that unit storeroom clerks ordinarily would have performed, but for the layoff of all of them during the 1991 shutdown. And the distribution of those supplies, like the distributions from inventory by nonunit personnel, had been made without affording the Union prior notice and an opportunity to bargain about those changes in procedure.

Furthermore, those events pertaining to the shipping and receiving department did not occur in a vacuum. As concluded earlier in this subsection, Respondent failed to satisfy its bargaining obligation in connection with Itoh's order. Moreover, as concluded in preceding subsections, Respondent further violated Section 8(a)(5) and (1) of the Act when it eliminated Local Rule 9, rescinded benefits already conferred as a result of its red-circle agreement, and transferred mechanical work to nonunit sawmill employees. In consequence, even if the shipping and receiving department unilateral changes had not been ''material, substantial and significant,'' of themselves, those ''apparently unimportant change[s] in a working condition take[] on more significance,'' *Xidex Corp. v. NLRB*, supra, 924 F.2d at 253, in the context of Respondent's other unfair labor practices. Therefore, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally allowing nonunit employees to perform shipping and receiving department employees' work during the 1991 shutdown.

F. *Withdrawal of Respondent's Offer to Partially Reimburse Annis*

As described in subsection III,A, supra, it is undisputed that Respondent withdrew its previously made offer to partially reimburse Annis for his medical examination and treatment in San Francisco that followed diagnosis of his pulmonary impairment. Moreover, Respondent admits that a factor in that withdrawal decision had been the Union's decision to pursue to arbitration a grievance concerning Annis' job transfer. That is shown by Greenhalgh's testimony, quoted in subsection III,A, supra, and, most specifically, by the portion of his letter quoted in that subsection to Cawvey on March 22, 1991. Section 7 of the Act protects the right of employees to file and process grievances. See, e.g., *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984). Accordingly, depriving Annis for that reason of a benefit promised in the course of his employment relationship violated Section 8(a)(3) and (1) of the Act. But, in the circumstances presented, analysis cannot simply terminate with that conclusion.

Respondent characterized its partial reimbursement offer as ''analogous to a proposal to settle a pending employment dispute.'' Based in that characterization, it contends that it properly withdrew its offer in light of the time that had elapsed without any specific response to that offer and the supposedly inconsistent action of filing and processing Annis' grievance to arbitration. However, in the circumstances, those factors do not provide the support for its proposed settlement contention urged by Respondent.

Of itself, passage of time without specific acceptance by Annis of the offer is not a significant consideration. Respondent never placed a time limitation upon acceptance when Greenhalgh originally made the offer to Annis on October 29, 1991. Respondent has not argued, nor provided evidence to support an argument, that it suffered any detriment from absence of a more immediate response by Annis to that offer. To the contrary, on March 22, 1991, almost 5 months after the offer had been made initially, Greenhalgh wrote to Cawvey in terms that clearly portrayed the offer as still viable. Indeed, the terms of that particular communication, quoted in subsection III,A, supra, convey the unmistakable meaning that the offer would continue to be viable into the

future. At no point in that communication did Greenhalgh express even the slightest concern about timeliness for its acceptance. Rather, the lone concern that Greenhalgh expressed in his letter in connection with the reimbursement offer pertained exclusively to pursuit of Annis' grievance to arbitration. However, in the final analysis, there was no relationship between the offer of reimbursement for expenses of medical examination and treatment, on the one hand, and the subject of the grievance, transfer of Annis from shift millwright to day shift, on the other hand.

To be sure, in his letter of October 29, 1990, Greenhalgh conditioned Respondent's partial reimbursement offer ''on the basis . . . that there will be no further claims against [Respondent] in this matter.'' But that letter makes no specific mention of any claims other than Annis' ''expense request for costs incurred and wages lost while being tested at the University of California Occupational Pulmonary Department in San Francisco.'' Accordingly, despite the letter's generalized reference to ''further claims,'' the context of that reference tends to show that Respondent intended its generalized terminology to refer only to ''expense request[s] for costs'' in excess of the $599 that Greenhalgh expressed willingness to pay Annis. In fact, Respondent admits as much in its brief: ''Nevertheless, [Respondent] made an offer to pay Annis $599.00 *if Annis agreed that no further claims relating to the medial examinations be filed against [Respondent]*.'' At no point does Greenhalgh's letter make any specific mention that the job transfer was encompassed, as well.

That is not necessarily surprising since at the time of Greenhalgh's offer on October 29, 1991, Annis had not yet been transferred from shift millwright to day shift. Nor was he to be transferred for almost another 2 weeks. In footnote 7 of its brief, Respondent argues that it had been aware of the need to make that job transfer at the time that Greenhalgh had sent that letter to Annis. However, that argument suffers from a lack of evidence to support it. In his explanation of reasons for making the offer, quoted in subsection III,A, supra, Greenhalgh made no mention whatsoever of Annis' subsequent job transfer as a consideration for the offer of October 29, 1990.

Nor is the evidence so clear that Respondent had even contemplated transferring Annis to day shift at the time that Greenhalgh had sent that letter. Not only did that transfer not occur until passage of almost another 2 weeks, but approximately a half year had elapsed since initial diagnosis of Annis' condition. Respondent presented no evidence that during that period it had even considered, much less reached a decision concerning, the possible need to transfer Annis to a different position. In sum, the evidence does not support Respondent's argument that Annis' transfer had been contemplated by its officials at the time of Greenhalgh's partial reimbursement offer on October 29, 1991. Of perhaps greater significance in the circumstances, not only was no specific mention of a future job transfer made as part of Greenhalgh's offer, but there is no basis in the evidence for concluding that Annis would likely have understood that Greenhalgh's offer encompassed relinquishing any right to protest any subject other than medical expenses exceeding $599. Indeed, so far as the record discloses, not until the following March did Respondent, itself, so contend.

In sum, neither testimonial evidence nor objective considerations support Respondent's argument that its partial reimbursement offer had contemplated waiver of any claim by Annis other than his already filed ''expense request for costs incurred and wages lost while being tested at the University of California Occupational Pulmonary Department in San Francisco.'' Accordingly, Respondent cannot expand the scope of its initial settlement offer by simply pasting on an added condition as a supposed intended quid pro quo for having originally made it. Nor is Respondent's position enhanced by two other contentions that it advances.

First, Respondent points out that it had not been ''obligated to pay Annis' lost wages or expenses related to the medical examinations in San Francisco.'' However, this is no more than a recast form of the argument made in connection with the Simpson arrangement: That Respondent had no obligation to accept particular orders from specific customers. Only in this instance, Respondent is arguing, in effect, that it had no obligation to provide a particular benefit to an employee. But, as with Itoh's order, the significant point is not Respondent's obligation to undertake a particular course of action. Rather, having freely chosen to do so, Respondent is obliged to follow the Act's requirements and proscriptions in pursuing its chosen course of action. As Greenhalgh explained, a belief of benefit derived from Annis' trips to San Francisco had led Respondent to offer partial expense reimbursement. The Act does not allow Respondent to condition such an offer on illegal conditions. Nor does it permit the offer's later withdrawal because Annis exercised his Section 7 right to file and pursue a grievance pertaining to a separate, but unrelated, consequence of his impaired condition.

Second, Respondent argues that there is no evidence that it harbored animus against Annis, nor has it been shown that Respondent intended to retaliate against Annis over the grievance's processing to arbitration. Yet, animus is not so narrow a concept that its meaning extends no further than one of hatred or malice. Dissatisfaction, even mild dissatisfaction, with an employee's protected activity suffices to supply animus. Here, Respondent does not dispute that it was dissatisfied with having to defend in arbitration its decision to transfer Annis to day shift. Thus, animus did exist. Moreover, in a broader sense, animus is one analytical tool for ascertaining whether causation exists between the exercise of Section 7 activity and an employer's action. Respondent admits that pursuit to arbitration of Annis' grievance had caused it to withdraw its partial reimbursement offer to him. In light of that admission of causation, no evidence of more extreme antagonism toward Annis is required. Therefore, a preponderance of the evidence establishes that Respondent violated Section 8(a)(3) and (1) of the Act when it withdrew its offer to Annis of partial expense reimbursement.

G. *Eaton's Statements to Nally and Newman*

As described in subsection III,A, supra, Nally and Newman each attributed to Eaton the independently made threat that overtime assignments would be curtailed if a grievance was filed about Eaton's failure to first call Nally and Mills for available overtime work during the night shift of November 5 to 6, 1991. The fact that an identical threat was attributed to Eaton on separate occasions by each of two employees tends to lend some support for a conclusion that the threat, in fact, had been made. Eaton denied having made those threats. However, certain factors undermine those denials and tend to support a conclusion that, indeed, Eaton had

threatened Nally and Newman as alleged by the General Counsel.

First, despite his denials, Eaton's description of what he had actually said to Nally and Newman contradicts those denials and tends to support Nally's and Newman's accounts. Thus, during his conversation with Nally, Eaton admitted having said,

> [W]e worked this time on straight time basis before, and that it was issues like this that always, you know, make it hard to keep on working overtime, especially when it can be done on a straight time basis, and, you know, maybe looking out for the rest of the people that's like to work the overtime, that, you know, my job is to save the company money, and if we can do it on a straight time basis, it should be, but we have been doing it on an overtime basis.

Similarly, Eaton conceded having told Newman ''virtually what I told [Nally]. I said that's—you know, it's tough to keep on paying the overtime for this kind of things.'' During cross-examination, Eaton further reinforced Nally's and Newman's accounts by admitting that he had told each of them that ''the work can be done on a straight time basis and had been before.''

Second, further support for the likelihood that Eaton had made the threats attributed to him is supplied by his own description of the circumstances underlying overtime assignments in 1991. Though not actually applicable to Baker's early call to work on November 6, 1991, Eaton testified that since 1984 he had followed a particular overtime assignment procedure worked out with his crew, one of whom had been a Standing Committee member. In agreeing to that arrangement, testified Eaton, he had specifically qualified his agreement by telling the crew, ''Sure, I'll give it a try, as long as there's no problems.'' Eaton admitted that prior to Nally's protest on November 6, 1991, ''We've never had any problems.'' Thus, Nally's grievance and Newman's effort to present it to Eaton posed the very circumstance that Eaton had told his crew must not occur if the overtime arrangement was to continued by him. That fact, coupled with his above-quoted acknowledgment of responsibility for saving Respondent money and his admitted statements to Nally and Newman that ''the work can be done on a straight time basis,'' buttress a conclusion that he had, in fact, made the threat to Nally and, later, to Newman which those two employees described.

Third, to support Eaton's general denials, Respondent relies on the testimony of Pulp Mill Superintendent Byron Wilson, whose office adjoined that of Eaton during, at least, November 1991. Instead of corroborating Eaton's account of his conversation with Newman, however, Wilson contradicted Eaton's account. Thus, the latter testified that Wilson had joined his conversation with Newman ''about halfway through the conversation of what Shannon felt about the grievance,'' which Newman had characterized as ''a horseshit grievance, and he didn't believe in it, and the only reason he came down there was because he was being pressured to do it.'' But, Wilson admitted during cross-examination that he had not overheard any of the conversation between Eaton and Newman, because the conversation between those two individuals had ended by the time that he (Wilson) had entered Eaton's office.

It is not material to the General Counsel's allegation whether or not Newman had personally felt, and had told Eaton, that there was no basis for Nally to grieve about not having been called for overtime work. Nally had a statutory right to file a grievance. As steward, Newman had a statutory right to process it. Both employees appeared to be testifying candidly about what Eaton had said to them. Newman's personal opinion of the grievance's merit hardly entitled Eaton to threaten adverse consequences for employees if that grievance was filed and processed. Therefore, I conclude that a preponderance of the credible evidence establishes that Eaton threatened to discontinue overtime work assignments if the grievance was filed and processed, thereby violating Section 8(a)(1) of the Act. That conclusion is not altered by Respondent's subsequent payment to Nally and Mills of the money they would have earned for working overtime, had one of them been called by Eaton, nor by the absence of curtailment of overtime assignments after Cawvey took over processing the grievance. For, neither action suffices as a repudiation under the standards set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

CONCLUSIONS OF LAW

Louisiana-Pacific Corporation, Western Division, has committed unfair labor practices affecting commerce by threatening to curtail overtime assignments if a grievance were filed and processed, in violation of Section 8(a)(1) of the Act; by withdrawing an offer to partially reimburse an employee for expenses of medical examination and treatment because a grievance of that employee was pursued to arbitration, in violation of Section 8(a)(3) and (1) of the Act; and, without affording prior notice and an adequate bargaining opportunity to Association of Western Pulp and Paperworkers, Local 49, the bargaining agent for hourly paid employees in an appropriate bargaining unit of Samoa pulp mill employees, by belatedly adding elimination of a layoff restriction to employment terms to be implemented pursuant of a final offer that had not previously encompassed elimination of that restriction, by retroactively rescinding the terms and already conferred benefits of an agreement to red- circle wage rates of employees who lost their jobs, and by assigning pulp mill mechanic, production, and shipping and receiving department work to nonunit employees, in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having concluded that Louisiana-Pacific Corporation, Western Division has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to reinstate the layoff restrictions set forth in Local Rule 9 of the 1988–1991 collective-bargaining contract and the red-circle wage rate agreement of August 1991. It also shall be ordered to reinstate any employees laid off as a result of its failure to continue observing the layoff restriction set forth in Local Rule 9 on and after August 10, 1991, and to reinstate the red-circle wage rate of all employees who qualified for its benefit

under the agreement of August 1991. In addition, it shall be ordered to make whole in accordance with normal Board principles all employees for any loss of pay and benefits suffered as a result of the changes made unilaterally by it, as well as the estate of Chuck Annis in the amount of $599, with interest to be paid on the amounts owing as computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Louisiana-Pacific Corporation, Western Division, Samoa, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing any term or condition of employment of employees in the appropriate bargaining unit described below, without first giving notice to Association of Western Pulp and Paperworkers, Local 49 and affording it an adequate opportunity to bargain about that proposed change. The appropriate bargaining unit is:

> All hourly paid employees in the Machine Room, Pulping, Causticizing, Material Handling & Shipping, Chip Dump, Storeroom, Technical, Recovery, Power Boiler, and General Departments and all Maintenance Department hourly paid employees of the pulp mill in Samoa, California; excluding employees classified as, or working in, administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other office work.

(b) Rescinding and refusing to honor agreements reached with the above-named labor organization concerning terms and conditions of employment for employees in the above-described bargaining unit.

(c) Withdrawing offers to reimburse employees' expenses for medical examination and treatment, or otherwise discriminating against employees because grievances are processed to arbitration, or because of activity or support for the above-named labor organization or any other labor organization.

(d) Threatening employees with discontinuance of overtime assignments if grievances are filed.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore and observe the layoff restriction set forth in Local Rule 9 of the 1988–1991 collective-bargaining contract with the above-named labor organization and, in addition, the terms of the red-circle wage rate agreement of August 1991.

(b) Reinstate any employee laid off as a result of failure to continue observing the layoff restriction set forth in Local Rule 9 and reinstate the red-circle wage rates earned by employees pursuant to the agreement of August 1991.

(c) Make whole, with interest on the amounts owing, all employees for any losses of pay and benefits suffered as a result of elimination of the layoff restriction set forth in Local Rule 9, of refusal to honor the red-circle wage rate agreement of August 1991, of the arrangement for unit pulp production to be performed by employees of Simpson Paper Company during the final calendar quarter of 1991, of performance of mechanic and storeroom clerk work by nonunit employees during the last 4 months of 1991.

(d) Preserve and make available to the Board or its agents, for examination and copying, all payroll, business and other records necessary to compute the backpay and reinstatement rights as set forth in the remedy section of this decision.

(e) Post at is Samoa, California complex copies of the attached notice marked ''Appendix.''[3] Copies of that notice on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by Louisiana-Pacific Corporation, Western Division immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that those notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''